In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,*

vs.

Justo R. Armijo.

No. 243.

To Barbara Chavez de Armijo, Appellant:

You will please take notice that on Monday, the 29th day of October, 1900, about the hour of twelve o'clock noon, or as soon thereafter as counsel can be heard, the undersigned will move the Court to dismiss your appeal, or if that may not be done, to affirm the judgment of the Court below for reasons set forth in printed motions, copies of which are hereto annexed, and will also submit a printed argument, a copy of which is hereto annexed, in support of said motions.

NEILL B. FIELD,
Attorney for Appellee.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,* vs. **Justo R. Armijo.**	*No. 243.*

Comes now the appellee, Justo R. Armijo, by Neill B. Field, his attorney, and moves the Court to dismiss the appeal in the above entitled cause, for the following reasons:

I.

Because the appellant did not, within sixty days after the allowance of the appeal by the Supreme Court of New Mexico, docket the said cause and file the record thereof with the Clerk of this court, as required by Section I, of Rule IX, (The appeal was allowed January 26, 1900, Extract page 18, and the record was not filed until April 6, 1900.)

II.

Because the transcript is not made up in accordance with the requirements of Section 2 of the Act of April 7, 1874, and the appellant, in disregard of the provision of said section, has caused to be certified up to this Court the oral evidence taken on the hearing before the referee but has not brought up anything to show that any ruling of the court on the admission or rejection of evidence was excepted to.

III.

Because the Supreme Court of the Territory of New Mexico refused to certify a statement of the facts of the case in the nature of a special verdict but made the following statement:

"Application having been made to the Court to find the facts in this case in accordance with the requirements of the act of Congress, it is ordered to be certified to the Supreme Court of the United States that this Court, for reasons disclosed by the judgment, is unable to find the facts, the appeal not having been perfected in such manner as to bring the facts of the case into this court." Extract, p. p. 19-20.

IV.

Because the assignment of errors filed with the transcript raises no question which can be reviewed by this Court on this record.

NEILL B. FIELD,
Attorney for Appellee.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,*

vs.

Justo R. Armijo.

No. 243.

Comes now the appellee, Justo R. Armijo, by Neill B. Field, his attorney, and moves the Court to affirm the judgment of the Supreme Court of the territory of New Mexico in the above entitled cause and to award him damages against the appellant therein for the following reasons:

I.

That although it may appear from the record that this Court has jurisdiction of this case, it is manifest that the appeal was taken for delay only.

II.

That the questions sought to be re-

viewed are so frivolous as not to need further argument.

Wherefore, appellee prays that the judgment of the Court below may be affirmed.

NEILL B. FIELD,
Attorney for Appellee.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,*

vs.

Justo R. Armijo.

No. 243.

Brief for Appellee on Motion to Dismiss and Affirm.

STATEMENT OF THE CASE.

On the 13th day of February, 1897, the appellee, Justo R. Armijo, commenced an action against appellant Barbara Chavez de Armijo, in the District Court of Bernalillo County, in the Territory of New Mexico, seeking to recover the sum of $9,434.44 as a balance due for services rendered during five years next before the first day of January, 1897.

The declaration was in assumpsit on the common counts and a bill of particulars of the plaintiff's claim was filed with the declaration.

On the 4th of March, 1897, defendant filed a plea of the general issue and also a plea of set-off.

On the 5th day of March, 1897, plaintiff filed a similiter to the first plea and a replication to the second plea of the defendant and the issues in the case were thereby made up.

On the 20th day of April, 1898, the defendant, by her counsel, moved the Court upon a written motion (Extracts page 5) to refer the case to a referee and on the same day the Court, over the objection of the plaintiff, referred the case to William D. Lee as Referee "to take the proofs of the plaintiff herein and that said referee to whom this cause is referred report his findings of fact and conclusions of law in this cause with all possible speed." (Extracts page 6.)

On the 18th day of August, 1898, the referee filed his report in the clerk's office recommending judgment in favor of plaintiff for $6,097.92 and costs. (Extract page 10.)

On the Second day of September the defendant filed exceptions to the referee's report. (Extract page 10.)

On the 15th day of September the exceptions to the referee's report were overruled, the findings of the referee adopted as the findings of the Court and judgment was rendered for $6,097.92 with interest and costs.

On the 15th day of September 1899, there was

lodged in the Clerk's office a writ of error from the Supreme Court of the Territory of New Mexico which is dated the 14th day of September, 1898. (This date is undoubtedly a clerical error and should be 1899.)

On the 18th day of November, 1899, the defendant, by her attorney's, presented to the judge of the trial court a bill of exceptions but the judge refused to sign the same. The record discloses no further effort on the part of appellant or her counsel to secure the authentication of the evidence or its incorporation into the record by a bill of exceptions or otherwise.

The case was docketed in the Supreme Court of the Territory, both upon the appeal and upon the writ of error, but in that Court no motion was made by counsel for appellee to dismiss the appeal nor was the appeal dismissed. A motion to strike from the transcript filed in each of said causes so much and such part thereof as purports to set forth the evidence adduced on the hearing of the case before the referee, to affirm the judgment of the court below and to enter judgment against the appellant and the sureties on her supersedas bond for the amount of the judgment and interest and ten per cent damages was made and granted in part. Seven grounds were specified in support of the motion. The Supreme Court of the Territory granted the motion upon the second ground specified which was, "Because no motion for new trial was filed in the court below within ten days after the judgment sought to be reviewed was rendered, as required by law." [illegible] affirmed the

judgment of the court below and entered judgment against the appellant and the sureties on her bond for the amount of the original judgment with interest and costs but declined to award damages against the appellant. (Extract page 5.)

A motion for rehearing was filed in the Supreme Court of the Territory and overruled, and thereupon the appellant prayed an appeal to this Court and asked the Court to make findings of fact in accordance with the requirements of the second section of the Act of April 7, 1874, but the Supreme Court of the Territory declined to make such findings of fact and ordered it to be certified to this court that that court could not, for reasons disclosed by the judgment, find the facts because the appeal was not perfected in such manner as to bring the facts of the case into that court. (Extract, pages 19-20.)

The appellant has filed in this court a transcript of more than two hundred printed pages but the extract printed for the information of the court on these motions is to all intents and purposes a complete transcript of the entire record because nothing is omitted therefrom except what purports to be the oral testimony taken before the referee, which oral testimony is not certified by the referee or by the trial judge and is improperly set up, being no part of the record.

The so-called code of civil procedure, of New Mexico, which took effect August 1, 1897, contains the following provisions:

"Sub-Sec. 138. All or any of the issues in the action, whether of fact or of law, or

both, may be referred upon the written consent of the parties."

"Sub-Sec. 139. Where the parties do not so consent, the court may, upon the application of either, or of its own motion direct a reference in the following cases:—

First. Where the trial of issues of fact shall require the examination of a long account on either side, in which case referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein, or

Second. Where the taking of an account shall be necessary for the information of the Court before judgment, or for carrying a judgment or order into effect, or

Third. When a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action."

"Sub-Sec. 152. Referees shall have power to rule upon objections to testimony, and upon the rejection of any testimony it shall not be taken. All testimony taken before referees shall be reduced to writing, and if either party shall except to the competency of witnessess, or the admission or exclusion of evidence, or any other matter to which exceptions may be taken, the referees, if required, shall state the particulars of the exceptions in their report."

"Sub-Sec. 153. Referees shall in all cases report as speedily as possible reciting the order of the Court, the notice to the parties, the time and place of stating the account or taking the testimony and all other proceedings had, and return the

same, together with the testimony taken, to the Court."

"Sub-Sec. 154. Referees, as soon as a report is ready, shall file the same in the clerk's office and notify the parties, or their attorneys, of the fact, and furnish a copy thereof to any attorney of record, who shall apply for the same, and the day of the filing shall be entered by the clerk on the docket. The parties shall have twenty days from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party, either party may have an order, as, of course, that the report be confirmed. If exceptions are filed, they shall stand for hearing upon the usual notice."

"Sub-Sec. 155. If exceptions are allowed the matter may again be referred with instructions, if necessary; but if the report is confirmed by the Court, judgment shall be rendered thereon. The same effect shall be given to findings of facts by referees as was heretofore given by law to such findings by masters in chancery under a general reference of a cause."

"Sub-Sec. 172. In all cases tried by the Court, either with or without the intervention of a jury, the testimony and all rulings of the Court shall be taken down by the court stenographer, unless waived by the parties to the action. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes. When such notes are transcribed and the correctness of the same is certified to by the court stenographer, the same shall become and be a part of the record in such action. In all actions the testi-

mony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme Court of the Territory upon appeal or writ of error, and it shall not be necessary to prepare or have settled, signed or sealed, any bill of exceptions in order to make any of such matters a part of the record in such action. When the stenographer shall have transcribed his stenographic notes he shall file the same in the office of the clerk of the court in which such action has been tried, and shall give notice to the attorneys of the parties to the action of the filing of said transcript, and either party to said action may, at any time within ten days after the service of said notice, file objection to such transcripts, and such objections shall be heard by the judge of such court upon the notice provided for by this act for hearings upon motions, and upon such hearing the judge shall determine and settle such objections, and if the transcript is determined to be incorrect the judge shall require such stenographer to correct the same according to the facts. If for any reason it shall be impracticable to make the testimony taken upon any trial a part of the record in the manner above provided, it may be made part of said record upon bill of exceptions, as heretofore provided by law. The court stenographer shall be compensated for taking down such testimony, in the same manner as now provided by law for such services rendered during a term of court. Said stenographer shall also receive for transcribing

such testimony the compensation now allowed by law, which shall be paid by the party having such notes transcribed."

"Sub-Sec. 132. Upon the rendition of any verdict, or the making of findings in any case tried by the court, judgment shall be immediately rendered thereon, unless notice is given at the time of the intention of the party to make a motion for a new trial."

"Sub-Sec. 133. All motions for new trials in cases tried by juries shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings."**

"Sub-Sec. 134. No motion to set aside any finding nor judgment rendered out of term time shall be entertained unless it shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment."

Complied Laws of 1897, Section 2685.

By an act approved March 16th, 1899, it was provided:

"Sec. 5. That sub-section one hundred and seventy-two (172) of section twenty-six hundred and eighty-five, Chapter One (1), Title XXXIII, of the Complied Laws of 1897, be amended so as to read as follows:- "In all cases tried by the Court, either with or without the intervention of a jury, the testimony, all rulings of the court, objections made and exceptions taken on the trial, shall be taken down by the court stenographer, unless waived by the parties to the action. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes, and

when the stenographer shall have transcribed his notes, he shall file the same in the office of the Clerk of the Court, in which the action in which they were taken was tried and thereupon, either party to said cause desiring to have the same embodied in a bill of exceptions, may give ten days notice to the opposite party of his intention of applying to the judge of the court in which said cause was tried, to have the judge of said court sign and seal said notes in proper form as a bill of exceptions, and may at the same time give notice of his intention to ask that any additional matters proper to be so incorporated, also be incorporated therein. Upon such notice, unless said transcript shall be shown to be incorrect, and in that case after correction the judge, or his successor, shall settle, sign and seal the said transcript as a bill of exceptions, adding thereto such additional matters properly sought to be added. For the purpose of having said bill of exceptions signed and sealed, it shall be necessary to make out a new copy of the notes of said stenographer, but the same may be referred to and identified as a part of the bill of exceptions; nor shall it be necessary to serve a copy thereof with the notice. If, for any reason, it shall not be impracticable to use the transcript of the stenographer's notes taken upon any trial in the manner above provided for, for the purpose of settling bills of exceptions, bills of exemption may be settled, signed and sealed in the same manner as they have formerly have been, when no stenographer was used. *In all actions tried without a jury, the testimony taken before a court, or that taken by a referee, the transcribed notes of the stenographer in such cases properly certified by the court or referee,*

and all motions, orders or decisions made or entered in the progress of the trial of any action, shall become and be a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal or writ of error, without any bill of exceptions, and it shall not be necessary to have any bill of exceptions settled, signed or sealed, in order to make any such matters a part of the record in cases so tried. It shall not be necessary to make a motion for a new trial in any case tried by the court without a jury,nor shall it be necessary to incorporate a motion for a new trial in a bill of exceptions in any case, but the same shall become a part of the without so doing. The court stenographer shall be compensated for taking down such testimony, in the same manner as now provided by law for such services rendered during a term of court. And the clerk of the District Court shall be allowed 10 cents per folio for making out and certifying a copy of the record and five cents per folio for certifying any part thereof copies of which may have been furnished by the stenographer, to be paid by the party suing out a writ of error or appeal."

Session laws of 1899, Chapter 75, Sec. 5,page 168.

Prior to the adoption of the code of civil procedure it was provided by statute:

"Sec. 1823. In all the courts in this Territory the common law as recognized in the United States of America shall be the rule of practice and decision."

C.L. 1884, Sec. 1823.

"Sec. 1907. All suits at law in the district courts shall be commenced by filing a declaration in the office of the clerk of the court, and the pleadings and practice shall

be according to the forms and rules of the common law; and all suits in equity shall be commenced by filing a bill in the office of the clerk of the court."

C. L. 1884, Sec. 1907.

"Sec.3. It shall not be necessary, when it is intended to review by appeal or writ of error any judgment of the district court, that a proposed bill of exceptions containing matters not apparent on the face of the record shall be or shall have been prepared included in or served with a copy of any proposed record in any cause, nor shall it be necessary to prepare or have prepared, any proposed bill of exceptions, or serve the same on the opposite party within ten days after judgment, but in any cause now pending, or which may hereafter be pending in the Supreme Court to review the judgment of a district court, any party desiring to have any material matter not apparent on the face of the record made a part of the record, may prepare a bill of exceptions, in which such proposed matter is incorporated, and present the same to the judge at any time within twenty days before the first day of the term of the Supreme Court in which said cause shall be docketed, and shall give the opposite party or his attorney, five days notice of his intention to present such bill of exceptions to the judge, and the opposite party shall within five days thereafter have leave to propose any amendmends to said bill of exceptions, giving notice thereof to the opposite party of the time when such amendment will be proposed and the time for proposing said bill of exceptions, and amendments, may at any time before or after its expiration be enlarged by the judge and the judge shall

settle and sign the exceptions at least ten days before the term of the Supreme Court in which said cause shall be first docketed, unless for cause satisfactory to him, he sould delay the same, in which event he shall settle and sign the same as soon as possible, and either party may at any time before a bill of exceptions is settled and signed, be heard before the judge as to the matter to be included therein, on giving one day notice to the opposite party or his attorney, and should any bill of exceptions not be settled before the time required for the filing of the record in the Supreme Court, such record may be filed in the Supreme Court at any time within ten days after said bill of exceptions shall be settled, and such cause shall be heard the same as if said record had been filed ten days before the first day of the term, provided, that the provisions of this section and the two previous sections of this act, shall not apply to any cause which has been docketed and the record filed in the Supreme Court prior to December 28, 1888."

Session Laws of 1889, Sec. 3, Chap. 1, Page 2.

It is believed that all local legislation touching procedure in the case at bar is here set out. It is set forth at length in order to demonstrate that whether this case is to be governed by the statutes in force at the time the issues were made up, or by the provisions of the code of civil procedure which were in force at the time the case was heard before the referee and at the time the record was certified to the Supreme Court of the Territory, no attempt was made by counsel for appellant to pre-

serve the evidence and the rulings of the referee upon the admission and rejection of evidence in accordance with the requirements of either system of procedure.

No motion for new trial was filed, and when the trial judge refused to settle and sign the bill of exceptions, no effort was made to obtain a certificate from the referee authenticating the evidence, but counsel proceeded upon the theory, apparently, that the clerk's statement: "And thereafter, on to-wit, the 18th day of August, 1898, there was filed in the office of said clerk of said court the oral testimony taken before Hon. W. D. Lee, the referee in said cause, which said testimony is in words and figures following, to-wit:" (Extract page 10), was sufficient to make the oral evidence a part of the record and to preserve the rulings of the referee on the admission and exclusion of evidence for review by the Supreme Court of the Territory. That Court appears not to have determined the question but decided, as its decision is understood by counsel for appellee, that in the absence of a motion for a new trial there was nothing before the Court but the judgment roll.

Whatever power may be claimed for, and conceded to, the Territorial legislature in the regulation of the procedure whereby the Supreme Court of the Territory exercises its appellate jurisdiction, it must be admitted that this Court exercises its jurisdiction to review cases determined by the Supreme Courts of the various Territories by virtue of the legislation of Congress, a jurisdiction

which can neither be enlarged nor abridged by any other legislative body.

The legislation of Congress, so far as material, is as follows:

> "Sec. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial Courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes or proceeding as the said Supreme Court have prescribed or may hereafter prescribe.
>
> Provided, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the Court on the admission and rejection of evidence when excepted to, shall be made and certified by the Court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree, * * * * * * * *."
>
> 1st. Supp. Rev. Stats. U. S. 7.

The appellant not only disregarded the provisions of the Territorial statutes for the preservation of the evidence and of the rulings of the referee for review by the Supreme Court of the Territory but she has, in utter disregard of the legislation of Congress, caused the evidence at large (without authentication) to be certified up to this Court; although this Court cannot examine that evidence for any purpose. Her counsel has assigned six grounds of error as follows:—

> "The said Supreme Court of the Ter-

ritory of New Mexico erred in the following particulars:

"1. The Court erred in dismissing the appeal and writ of error of the appellant herein from the District Court of the second judicial district of said Territory, on motion of the appellee, without hearing this cause on the merits.

2. The Court erred in dismissing said appeal and writ of error on the motion of appellee and affirming the judgment of the said District Court for the reason set out in said motion.

3. The Court erred in dismissing said appeal and writ of error and affirming the judgment of said District Court, for the reason that the transcript of the record showed that a motion for a new trial had not been filed in said District Court.

5. The Court erred in refusing to make findings of fact on which it based its action in dismissing said appeal and writ of error.

6. The Court erred in inspecting the transcript of the record in this case for the purposes of ascertaining that a motion for a new trial had not been filed in said cause and at the same time refusing to inspect said transcript to consider and adjudge the whole case on its merits." (*Extract, page 21.*)

It will be observed that no one of the assignments attempts to call in question or bring up for review any action of the trial Court but all are based upon alleged errors committed by the Supreme Court of New Mexico.

The first four are apparently based upon a

misconception of what was actually done by that Court while the sixth is clearly frivolous.

The meaning of the fifth assignment is by no means clear. If it is to be taken literally, it is contradicted by the record. The Supreme Court of New Mexico found, as a fact, from an inspection of the record that no motion for a new trial was filed in the Court below. It adjudged, as matter of law, that in the absence of a motion for new trial, it could not examine the errors complained of, and affirmed the judgment of the trial Court.

It refused to make findings of fact, holding as matter of law, that the evidence was not before it. It affirmed, however, the judgment of the Court below.

By its judgment the trial court adopted the findings of the referee, as its findings and that judgment is not attacked and no error is assigned thereon in this court.

Errors, if any, committed by the Supreme Court of New Mexico in the exercise of its appellate jurisdiction in this case were and are without prejudice to the appellant unless error prejudicial to her rights was committed by the trial court.

An assignment of errors based entirely upon the action of the supreme court of the Territory and which alleges no error of law upon the part of the trial court is not such an assignment of errors as is required by the statute of the United States and presents no question for review by this court.

The appellee has filed a motion to dismiss the appeal upon the following grounds:

I

Because the appellant did not, within sixty days after allowance of the appeal by the Supreme Court of New Mexico, docket the said cause and file the record thereof with the clerk of this Court, as required by Section 1 of Rule IX, (the appeal was allowed January 26, 1900, Extract page 18, and the record was not filed until April 6, 1900).

II

Because the transcript is not made up in accordance with the requirements of Section 2 of the act of April 7th, 1874, and the appellant, in disregard of the provision of same section, has caused to be certified up to this Court the oral evidence taken on the hearing before the referee but has not brought up anything to show that any ruling of the Court on the admission or rejection of evidence was excepting to.

III

Because the Supreme Court of the Territory of New Mexico refused to certify the statement of the facts of the case in the nature of a special verdict but made the following statement:

"Application having been made to the Court to find the facts in this case in accordance with the requirements of the act of Congress, it is ordered to be certified to the Supreme Court of the United States that this Court, for reasons disclosed by the judgment is unable to find the facts, appeal not having been perfected in such a manner as to bring the facts of the case into this court." (Extract, p. p. 19-20.)

IV.

Because the assignment of errors filed with the transcript raises no question which can be reviewed by this Court on this record.

Appellee has also filed a motion to affirm the judgment of the Supreme Court of New Mexico, as the rules of this court permit, and assigns the following grounds therefor:

I.

That although it may appear from the record that this Court has jurisdiction of this case, it is manifest that the appeal was taken for delay only.

II.

That the questions sought to be reviewed are so frivolous as not to need further argument.

Upon these motions appellee submits the following:

POINTS AND AUTHORITIES.

I.

There has been such disregard of all statutory requirements on the part of appellant that her appeal should be dismissed.

It is not contended that this Court is not invested with full jurisdiction to hear and determine every question which can arise upon the record in this case. The contention is, that there has been such irregularity in the method of procedure; such disregard of statutory requirements and such neg-

lect to properly prepare and present the record in such form as would enable the Court, without unnecessary labor, to adjudicate the rights of the parties, that the Court should dismiss the appeal.

The mere delay in filing of the transcript and docketing the appeal, standing alone, would be of no consequence as this Court has frequently decided that it would not dismiss an appeal for such delay. It is urged upon the attention of the Court in this case only in connection with other and much more serious delinquences.

A transcript of more than two hundred pages has been filed. If this cause goes to a hearing upon the merits, this transcript must be printed and read by the Court and all that part of it not printed for use upon this hearing is brought here in defiance of the express command of the statute. That its presentation here will impose additional labor upon the Court and counsel, as well as greatly increase the costs, cannot be denied, nor is it believed that it can be explained otherwise than by the neglect of counsel to inform himself of the provisions of the statute or his refusal to be bound by them.

Again, the assignment of errors filed shows that it must have been prepared without examination of the judgment of the Supreme Court of New Mexico and in utter disregard of the statutory limitations upon the jurisdiction of this Court in such case as this.

It is earnestly insisted that this assignment of errors raises no question which this Court can review upon this record and that there is nothing in

the case which requires the Court to exercise its option to notice a plain error not assigned.

While it is true that the precise question here presented has never been passed upon by this Court, it is submitted that the contention of appellee finds support in several cases heretofore decided.

Benites v. Hampton, 123 U. S., 519.
Rowe v. Phelps, 152 U. S., 87.
Micas v. Williams, 104 U. S., 557.
The Alaska, 130 U. S., 201.
The S. C. Tryon, 105 U. S., 267.
Chanute City v. Trader, 132 U. S., 210.
Walston v. Nevin, 128 U. S., 578.

If the motion to dismiss must be overruled, it is hoped that there is sufficient color for it, to authorize the Court to examine and consider the motion to affirm the judgment of the Court below. If such examination may be entered upon, it is believed that, on this record, the case is fairly within the provisions of paragraph five of rule six of the rules of this court, because it is manifest that the appeal was taken for delay and that the questions sought to be reviewed are so frivolous as not to require argument.

I.

It is manifest that this appeal was taken for delay.

If the report of the referee is a part of the record and can be examined by this Court upon the motion to affirm, it would seem to be clear from that report and from the judgment of the trial Court adopting the referee's findings that the

original appeal to the Supreme Court of the Territory must have been taken for delay and without reasonable hope or expectation of obtaining a reversal because it is a firmly established rule of the Supreme Court of New Mexico that such a finding made upon conflicting evidence will not be disturbed by the Supreme Court, but, in addition to this, this record discloses the fact that no motion for new trial was filed in the trial Court within the time prescribed by law, nor was the evidence made part of the record by bill of exceptions or anything equivalent thereto.

The rulings of the referee upon the admission and rejection of evidence were not preserved and the assignment of errors filed in the Supreme Court of the Territory is not at all in conformity with the requirements of the rules of that Court.

The decisions of the Supreme Court of New Mexico from the organization of that Court to the present time are uniform to the effect that, "Where a jury is waived and the cause is tried by the Court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate Court, must move for a new trial below and, if refused, embody the evidence in a bill of exceptions." The quotation is from the syllabus of the case of Sierra County vs. Don Ana County, 5 New Mexico, 191.

The line of decisions begins with Speigleberg vs. Mink, 1 N. M., 308, and is unbroken to the case of Insurance Company vs. Walker, decided at the same term as the case at bar and not yet reported.

The same uniformity of decision by the

Supreme Court of New Mexico is found with reference to the effect of the findings of the Court based upon disputed evidence in cases where jury is waived. The doctrine is first laid down in Zanz vs. Stover, 2 N. M., 34, in the following language:

"The Court having acted in this case as a jury, so far as its decisions on questions of fact was concerned, its verdict should not be set aside, nor the judgment thereon reversed, in a case where there is any evidence whatever, on which it could be based."

From the time of the decision of the case quoted in 1880, until the present time, the rule then announced has never been departed from. It has been rigidly applied to findings by a master in many cases.

"The court below had, as we have, a mere dry transcript of testimony upon which to base conclusions of fact. It will be necessary to determine whether the findings of fact by a master, which have some evidence to sustain them, will be treated as unassailable in all respects as the verdict of a jury. It will be sufficient to say in this case the findings of fact by a master, which depend upon the weight of conflicting testimony, have every presumption of correctness in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part, and that a disregard of this rule by the district court, acting solely on the master's report, and without any new testimony, is reversible error."

DeCordova vs. Korte, 7 N. M., 683.

No reason is perceived why the rule laid down in the case last cited is not applicable to the referee's decision in the case at bar.

If, in the light of these decisions, it could be believed that counsel who took the original appeal to the supreme court of the territory had any reasonable expectation of securing a reversal of the judgment of this case at the hands of that court, such belief must be removed by an examination of the exceptions filed with the referee's report (Extracts p. p. 10a–10b.) and to the assignment of errors filed in the Supreme Court of New Mexico, (Extracts p. 11.)

It is submitted that without a motion for a new trial and a bill of exceptions preserving the evidence and the rulings on the evidence, there was no reason to expect that the Supreme Court of New Mexico would examine any of the errors assigned.

If it is manifest that the appeal to the Supreme Court of New Mexico was taken for delay, the same thing is true of the appeal to this court because in this court error is not assigned upon any action of the trial court.

This court has held in at least one case that it would not review the action of the Supreme Court of a Territory on a question of practice such as this.

Sweeney v. Lomme, 22 Wallace, 208.
Laird v. Upton, 8 N. M., 413.
Torlina v. Trolicht, 6 N. M., 854.
Torlina v. Trolicht, 5 N. M., 148.
Territory v. Christman, 9 N. M., 586.

Lynch v. Grayson, 7 *N. M.*, 26.
Frayson v. Lynch, 163 *U. S.*, 468.
Perez v. Barber, 7 *N. M.*, 223.
Rogers v. Richards, 8 *N. M.*, 658.

II.

The questions sought to be reviewed are too frivolous to require argument.

The case comes into this court without a finding of facts by the Supreme Court of the Territory as required by the second section of the act of 1874. An application was made to that court to make such finding of facts but the court declined to do so upon the ground that appellant had not perfected her appeal in such manner as to bring the evidence before that court.

Whatever the appellant's remedy for a refusal by the Supreme Court of the Territory of New Mexico to make a finding of facts in a proper case, it is certainly not the one upon which appellant apparently relies. She has caused to be certified up what purports to be the oral testimony taken before the referee, which the Supreme Court of New Mexico has declared is no part of the record, ignoring the repeated decisions of this court and the plain language of the act under which this court exercises jurisdiction in this class of cases.

> "Out further examination must proceed upon the finding of facts as made by the court below, for this being an appeal from the Supreme Court of a Territory those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly

taken to rulings on the admission or rejection of edidence, is limited to determining whether the findings of fact support the judgment. Stringfellow v. Cain, 99 U. S., 610; Neslin v. Wells, 101 U. S., 428; Eilers v. Boatman, 111 U. S., 356 Idaho and Oregon Land Company v. Bradbury, 132 U. S., 509; Mammoth Mining Company v. Salt Lake Machine Company, 151 U. S., 447, 450; Haws v. Victoria Copper Mining Company, 160 U. S., 303; Gildersleeve v. New Mexico Company, 161 U. S., 573; Bear Lake and River water Works and Irrigation Gompany v. Garland, 164 U. S., 1, 18."

Harrison v. Perea, 168 U. S. 323.

"In effect, all the assignment of error and the argument based thereon rest in reason on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence and disregard the facts as found. If the argument be that the findings of fact are the mere statement of ultimate legal propositions, and therefore they may be disregarded or reviewed, then the result of the contention is that there are no findings of fact and nothing to review, and if the other aspect be looked at, the views which we have just expressed are conclusive."

Young vs. Amy, 171 U.S., 187.

The appellant when she procured this cause to be sent to a referee against the objection of appellee, thereby waived any right to have the findings of the referee or his rulings on evidence reviewed.

This was, as has been shown, an action of assumpsit in which the parties had a constitutional right to a trial by jury. The appellant, who was the defendant, waived that right and procured the case to be sent to a referee who thereby became as to the appellant an independent tribunal, a mere arbitrator with power to bind the appellant alone, by his decisions.

The review of his decisions upon the evidence or upon the admissibility of evidence is not with the jurisdiction of the supreme court of New Mexico or of this court and it must be presumed that the trial judge refused to settle a bill of exceptions for this and other sufficient reasons.

Bond vs. Dustin, 112 U. S., 604.

Respectfully submitted,

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